

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

MIDAMERICAN ENERGY COMPANY,
BLACK HILLS/IOWAGAS UTILITY
COMPANY, LLC d/b/a BLACK HILLS
ENERGY, IOWA ASSOCIATION OF
ELECTRIC COOPERATIVES, INTERSTATE
POWER AND LIGHT CO. and IOWA
ASSOCIATION OF MUNICIPAL UTILITIES,

Petitioners,

v.

IOWA UTILITIES BOARD, A DIVISION OF
THE DEPARTMENT OF COMMERCE

Respondent.

Case No. CVCV064145

MOTION TO STAY

MidAmerican Energy Company, Black Hills/Iowa Gas Utility Company, LLC d/b/a Black Hills Energy (“Black Hills Energy”), Iowa Association of Electric Cooperatives, Interstate Power and Light Company, and Iowa Association of Municipal Utilities (collectively, “Petitioners”) pray this Honorable Court stay the orders of the Iowa Utilities Board (“Board”) requiring payment of the assessment before this Court has an opportunity to review the merits of the protest through the Petition for Judicial Review. In support, Petitioners state as follows:

Petitioners filed their petition for judicial review in the above-captioned matter, challenging a non-unanimous Board order that denied Petitioners’ protest of a May 2022 assessment purportedly levied under section 476.10A of the Iowa Code. On the same date, Petitioners filed a motion to stay with the Board under Iowa Code section 17A.19(5)(a) and 199 Iowa Administrative Code section 7.28. The motion for stay asked the Board to stay its order of July 29, 2022, which required payment of the protested assessment within ten (10) days, contrary

to its own rule at 199 Iowa Administrative Code section 17.10(7), which required the Board to give Petitioners thirty (30) days to pay the protested assessment.

On Friday, August 26, 2022 the Board issued a non-unanimous order that denied Petitioners' motion for stay and reasserted its non-unanimous order to pay the protested assessment (attached). The Board's order was signed and issued after 4:00 PM on Friday, not served until business hours had closed, and requires Petitioners or their members to pay millions of dollars by the next business day, Monday, August 29, 2022.

Pursuant to Iowa Code section 17A.19(5)(c), the Petitioners now move for relief from the Board action refusing the requested stay and the requirement to make payment by Monday, August 29, 2022. Although Black Hills Energy, some electric cooperatives and some municipal utilities have already paid the assessment, all Petitioners protest the assessment and even those who have paid seek a refund of the assessment. The Board failed to issue rules properly governing the assessment at issue despite legislative direction to do so, departed from decades of precedent issuing one assessment per fiscal year, and, after fully collecting all amounts already due from Petitioners or their members under section 476A.10, billed them an additional, excess assessment instead of winding down the program per the legislature's directive. The Petitioners are likely to succeed. There is no harm to the State in delaying payment, and thus no anticipated injuries. Indeed, it is likely easier and more effective administratively to resolve the legality of the assessment before funds are transferred and the public interest favors resolving questions about the tax that will ultimately be borne by individual customers. *Id.* § 17A.19(5)(c).

Balancing the applicable factors supports a stay of the Board's order pending judicial review.

I. The Statutory Factors Governing Stays of Board Actions Counsel in Favor of Staying the Board's July 29, 2022 Order.

When an agency denies a requested stay pending judicial review, the district court may grant relief after consideration and balancing of the following statutory factors:

- (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
- (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
- (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
- (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

Iowa Code § 17A.19(5)(c).

A. Petitioners are substantially likely to prevail in this action seeking judicial review.

The first factor the Court is required to consider in determining whether a stay should be granted is the extent to which Petitioners are likely to prevail in this action seeking judicial review. In this regard, it must be noted that the assessment under section 476.10A is a tax, which tilts the merits to Petitioners' favor: "Statutes which impose taxes are construed liberally in favor of the taxpayer and strictly against the taxing body. It must appear from the language of a statute that the tax assessed against the taxpayer was clearly intended." *State ex rel. Iowa Dep't of Transp. v. Gen. Elec. Credit Corp. of Delaware*, 448 N.W.2d 335, 341 (Iowa 1989). The protested May 2022 assessment was not clearly intended.

Iowa Code § 476.10A provides a statutory assessment mechanism for funding the Iowa Energy Center ("IEC") and the Center for Global and Regional Environmental Research ("CGRER"). This mechanism is implemented by the Board in the form of an assessment on the

gross revenues of each electric and gas utility in the state of Iowa. For each fiscal year of the IEC's funding, the Board is required to direct "all electric and gas utilities to remit to the treasurer of state one-tenth of one percent of the total gross operating revenues during the last calendar year derived from their intrastate public utility operations." Iowa Code § 476.10A(1)(a). Of the amount collected, 85% is appropriated to the IEC. Iowa Code § 476.10A(1)(c)(1). In 2017, the Iowa Legislature imposed a July 1, 2022 "sunset date" for both the IEC and the assessment. 2017 Iowa Acts ch 169 §§ 34-38, 40.

The Board has been responsible for collecting this assessment from electric and gas utilities since the IEC was created in 1990. 1990 Iowa Acts, ch 1252 § 30 (codified at Iowa Code § 476.10A). The Board's longstanding practice for implementing this requirement was straightforward: in the fall, shortly after the beginning of each state fiscal year ("FY") (which begins on July 1 of the prior calendar year and ends on June 30 of the next calendar year¹), the Board would send an invoice to each electric and gas utility for an amount equal to 1/10th of one percent of the utility's gross electric and gas revenues during the prior calendar year. For example, the assessment issued in September 2020 (shortly after the beginning of state fiscal year 2021 which began on July 1, 2020) was calculated using the utility's most recent full calendar-year of electric and gas revenues: that is, the 2019 calendar year. The longstanding practice of the Board, until 2020, was to assess, collect, and disburse the moneys from one calendar year of revenue results entirely within one state fiscal year.² The Board has consistently interpreted the statute as authorizing a single assessment in a single fiscal year based on a single year's revenue.

¹ For example, July 1, 2021 was the beginning of Fiscal Year 2022.

² The FY 2020 assessment, issued in fall 2019, was based on revenues from calendar year 2018; The FY 2019 assessment, issued in fall 2018, was based on revenues from calendar year 2017, and so on. To the knowledge of Petitioners, this has been the pattern and practice of the Board since the assessment was created in the 1990s.

In 2018, the Iowa Legislature amended section 476.10A to incrementally reduce funding levels to the IEC in each of the four state fiscal years from 2019 to 2022, ultimately culminating with the repeal of the section on July 1, 2022. 2018 Iowa Acts ch 1172, § 91 (codified at Iowa Code § 476.10A(1)(c)(1)(a)-(d) (appropriating increasing portions of the IEC's assessment to the state general fund instead of the IEC)). In other words, beginning on July 1, 2018, the IEC would gradually receive less and less funding each state fiscal year as appropriations to the general fund increased, until the assessment was repealed on July 1, 2022.³

However, this did not happen. The Board traditionally issued invoices for the section 476.10A assessment in September or October of each year and followed that practice in the fall of 2018 and 2019 for state fiscal years 2019 and 2020. But in state fiscal year 2021 the Board departed practice. In September 2020 the Board assessed utilities for state FY 2021 using each utility's calendar year 2019 revenues. Then, in May 2021, the Board again assessed utilities using their calendar year 2020 revenues. Based upon the Board's past assessment practices, the Petitioners believed the May 2021 assessment to be the moneys for the state's FY 2022 disbursement, and

³ Specifically, section 476.10A(1)(c) provides that assessments to the IEC and general fund would be as follows for the four state fiscal years from state fiscal year 2019 to state fiscal year 2022:

c. (1) Of eighty-five percent of the remittances collected pursuant to this section, the following shall occur:

(a) For the fiscal year beginning July 1, 2018, such remittances are appropriated to the Iowa energy center created in section 15.120.

(b) For the fiscal year beginning July 1, 2019, the first one million two hundred eighty-thousand dollars of such remittances shall be transferred to the general fund of the state, and the remaining amount is appropriated to the Iowa energy center created in section 15.120.

(c) For the fiscal year beginning July 1, 2020, the first two million nine hundred ten thousand dollars of such remittances shall be transferred to the general fund of the state, and the remaining amount is appropriated to the Iowa energy center created in section 15.120.

(d) For the fiscal year beginning July 1, 2021, the first three million five hundred thirty thousand dollars of such remittances shall be transferred to the general fund of the state, and the remaining amount is appropriated to the Iowa energy center created in section 15.120.

their last assessment under section 476.10A before its repeal. However, instead of assigning the assessment to FY 2022 as anticipated, the Board remitted those moneys during state FY 2021, *effectively doubling the assessment and appropriations for FY 2021*. The Board's FY 2021 annual report on page 34 acknowledges the double recovery.⁴ Then, in May 2022, the Board issued another assessment based upon each utility's calendar year 2021 revenues and now seeks to apply those moneys to state FY 2022. These actions are detailed in a letter from the Board's accounting supervisor to the Iowa Economic Development Authority dated June 30, 2021 (attached and marked as Exhibit B) and a history and schedule of assessments and payments under section 476.10A prepared by the Board and dated June 13, 2022 (attached as Exhibit C).⁵

The net effect of the Board's administration of section 476.10A since July 1, 2018, and in particular the Board's attempt to impose the May 2022 assessment, is to impose a tax that was not clearly intended by the language of the authorizing statute and that is contrary to legislative authority and intent. As the Board's own records demonstrate, the Board has now asserted *five* full-year assessments over *four* fiscal years, and *increased* appropriations to the IEC at the very time the legislature intended that they *decrease*. The Petitioners objected to the May 2022 assessment as excessive, unreasonable, erroneous, unlawful, and/or invalid as it acts as an "extra assessment" not contemplated by Iowa Code § 476.10A and would effectively result in an appropriation for state FY 2023 that has not been authorized by the legislature. As such it exceeds the power granted the agency, which is limited to that granted by statute. *City of Des Moines v. Iowa Dep't of Transportation*, 911 N.W.2d 431, 439 (Iowa 2018); *Brakke v. Iowa Dep't of Nat.*

⁴ [iub-fy2021-annual-report_11.29.2021.pdf \(iowa.gov\)](#) (see specifically pages 34 to 47, which detail assessments to each utility based on CY2019 and CY2020 revenues collected in state FY2021).

⁵ Exhibit markings reflect the markings as submitted in the proceedings before the Board.

Res., 897 N.W. 2d 522, 533-34 (Iowa 2017). Given all the above, a substantial likelihood that Petitioners will prevail exists, and favors the grant of a stay pending judicial review.

B and C. Irreparable Injury and Relative Harm.

The harm at issue is the payment of a tax not supported by legislation or by past practice. Petitioners acknowledge that “loss of revenue, even if substantial, does not amount to irreparable damage to support a stay of agency action pending judicial review.” *Grinnell Coll. v. Osborn*, 751 N.W.2d 396, 402 (Iowa 2008). However, this is more than an issue of revenue or loss of revenue, this is an issue of an illegal tax that ultimately will be borne by the customers of the utilities that are compelled to pay it.⁶ Furthermore, the municipal utilities and electric cooperatives are nonprofit/consumer owned. There is no harm to the Board or the State to delay payment of the assessment until judicial review is complete – as noted above, loss of revenue – and by analogy delay in receiving revenue – is not irreparable. But the relative harm to individual customers that face increased utility bills is a relative harm that is much greater, especially at a time when inflation and increased energy costs have strained customers’ resources. The amounts due under the 2018 session law have been paid. On balance, preserving the status quo avoids unwinding accounting processes, is an easier path, and favors the equities between the state on one hand and individual customers and taxpayers on the other. It also protects Petitioners and their members from the impractical, unrealistic, and unfair expectation that they turn millions of dollars in assessments in less than one business day.

⁶ For customers of municipal utilities and rural electric cooperatives, amounts assessed under section 476.10A are recovered through rates charged to the individual customers, some may be shown as a separate charge and others may be included in the rate; but all impact customer's individual bills. For rate-regulated utilities, amounts assessed under section 476.10A are recoverable through the utility's energy efficiency plan and budget and could reduce funds otherwise available to customers to support energy efficiency activities. See Iowa Code §§ 476.6(15), 476.10A(1)(b).

D. The Public Interest favors the Customers who will ultimately pay these costs.

Again, it is the customers of the utilities who will ultimately pay the costs of this unnecessary assessment. The “tax-paying public has a strong general interest in governmental spending” *Craigmont Care Ctr v. Dep’t of Social Servs.*, 325 N.W.2d 918, 920-21 (Iowa Ct. App. 1982). The agency may need to yield to the interest of tax payers to ensure the tax is appropriate before it is collected. *Grinnell Coll. v. Osborn*, 751 N.W.2d 396, 403 (Iowa 2008). The public interest strongly mitigates in favor of maintaining the status quo until the propriety of the May 2022 assessment is finally determined.⁷

CONCLUSION

In the Board’s initial order, the Board ordered payment within 10 days despite the Board’s own rule permitting payment within thirty days. The Board’s late-Friday ruling on the motion to stay implements the 30-day window from the date of initial order, essentially seeking payment immediately. The Board reasoned that it could not stay the assessment because granting this relief would constitute direction to utilities that they need not remit statutorily assessed funds. This is not a logical consequence of granting a motion to stay. The Petitioners are not thwarting the Board’s authority but asking for a court to review the situation and provide its judgment. The stay will maintain the status quo until the court has had the opportunity to review the matter. The balance of factors required to be considered under section 17A.19(5)(c) favors the grant of a stay, and accordingly Petitioners pray this court enter a stay of the board’s July 29, 2022 order, as corrected by the Board’s August 26, 2022 order, pending judicial review herein.

⁷ Also mitigating in favor of a stay is the fact that the time of compliance in the Board’s late Friday ruling is not feasible for municipal utilities which typically must hold a public meeting of the city council or board of trustees to approve the payment of claims and invoices. Such public meetings require at least 24 hours’ notice prior to the commencement of the meeting. See Iowa Code section 21.4.

Respectfully submitted,

**MIDAMERICAN ENERGY
COMPANY**

By /s/ *Mark D. Lowe*
Mark D. Lowe AT0004844
666 Grand Avenue, Suite 500
Des Moines, Iowa 50309
Phone: (515) 281-2642
Fax: (515) 242-4398
Email: mark.lowe@Midamerican.com

ATTORNEY FOR MIDAMERICAN
ENERGY COMPANY

BLACK HILLS ENERGY

By /s/ *Adam P. Buhrman*
Adam P. Buhrman AT 0011611
1731 Windhoek Drive
Lincoln, NE 68512
Phone: (402) 221-2630
Email: Adam.buhrman@blackhillscorp.com

ATTORNEY FOR BLACK HILLS/
IOWA GAS UTILITY COMPANY, LLC d/b/a
BLACK HILLS ENERGY

**IOWA ASSOCIATION OF ELECTRIC
COOPERATIVES**

By /s/ *Dennis L. Puckett*
Dennis L. Puckett AT0006476
6601 Westown Pkwy., Suite 200
West Des Moines, Iowa 50266
Phone: (515) 247-4710
Fax: (515) 244-3599
Email: dpuckett@sullivan-ward.com

ATTORNEY FOR IOWA ASS'N
OF ELECTRIC COOPERATIVES

**INTERSTATE POWER AND LIGHT
COMPANY**

By /s/ *Matthew J. Sowden*
Matthew J. Sowden, AT0014101
500 East Court Ave., Suite 300
Des Moines, IA 50309
Phone: (515) 558-9703
E: MatthewSowden@alliantenergy.com

ATTORNEY FOR INTERSTATE
POWER AND LIGHT COMPANY

**IOWA ASSOCIATION OF MUNICIPAL
UTILITIES**

By /s/ Timothy J. Whipple
Timothy J. Whipple (AT0009263)
Ahlers & Cooney, P.C.
100 Court Avenue, Suite 600
Des Moines, IA 50309-2231
Phone: (515) 246-0379
Email: twhipple@ahlerslaw.com

By /s/ Jason M. Craig
Jason M. Craig (AT0001707)
Ahlers & Cooney, P.C.
100 Court Avenue, Suite 600
Des Moines, IA 50309-2231
Phone: (515) 246-0372
Email: jcraig@ahlerslaw.com

**ATTORNEY FOR IOWA ASSOCIATION
OF MUNICIPAL UTILITIES**

Original Filed.

Service via EDMS.